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07/12/07

HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench : Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Miscellaneous Appeal (C.) No.1047of 2007

Branch Manager, New India Assurance Co. Ltd.

versus

Laxminarayan Thawait and another

Miscellaneous Appeal (C.) No.1246 of 2007

Laxminarayan Thawait

versus

Ashok Bus Service and another

Miscellaneous Appeal (C.) No.1247of 2007

Ashok Bus Service

versus

Laxmi Narayan Thawait and another

ORDER

Post for 06-12-2007

Sd/-
Dilip Raosaheb Deshmukh
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench : Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Miscellaneous Appeal (C.) No.1047of 2007

Appellant Non-Applicant No.2		Branch Manager, New India Assurance Co. Ltd., Through its Divisional Manager, New India Assurance Co. Ltd., Bus Stand Road, Opposite Rajiv Plaza, Bilaspur (Chhattisgarh)
	versus	
Respondent No. 1 Applicant	1.	Laxminarayan Thawait, S/o Shri Kunj Bihari Thawait, Baloda, Out Post – Baloda, District Janjgir-Champa (C.G.)
Respondent No.2 Non-Applicant	2.	Ashok Bus Service, through Niyojak, Ashok Bus Service, Bus Stand, Bilaspur (C.G.)

Appeal under Section 30 of the Workmen's Compensation Act, 1923

Present: Shri N.K.Agrawal, Senior Advocate with Shri Qamrul Aziz, counsel for the appellant.
Shri S.P. Kale, counsel for respondent No.1.
Shri Vaibhav A. Goverdhan, counsel for respondent No.2.

Miscellaneous Appeal (C.) No.1246 of 2007

Appellant (Claimant)		Laxminarayan Thawait, S/o Shri Kunj Bihari Thawait, Aged about 61 years, R/o Baloda, Post – Baloda, District Janjgir-Champa (C.G.)
	versus	
Respondents (Non-Applicants)	1.	Ashok Bus Service, through Niyojak, Ashok Bus Service, Bus Stand, Bilaspur (C.G.)
	2.	Branch Manager, New India Insurance Co. Ltd., Branch Office, Rajendra Nagar Chowk, Bilaspur (C.G.)

Appeal under Section 30 of the Workmen's Compensation Act, 1923

Present :
Shri S.P. Kale, counsel for the appellant.
Shri Vaibhav A. Goverdhan, counsel for respondent No.1.
Shri N.K. Agrawal, Senior Advocate with Shri Qamrul Aziz, counsel for respondent No.2.

Miscellaneous Appeal (C.) No.1247of 2007

Appellant (Owner)		Ashok Bus Service, Through Niyojak Radheshyam Nathani, Ashok Bus Service, Bus Stand, Bilaspur (Chhattisgarh)
	versus	
Respondents (Claimant)	1.	Laxmi Narayan Thawait, S/o Kunj Bihari Thawait, R/o Near Bus Stand Baloda, Post – Baloda, District Janjgir-Champa (Chhattisgarh)
(Insurer)	2.	Branch Manager, The New India Insurance Company Limited, Branch Office, Rajendra Nagar Chowk, Bilaspur (Chhattisgarh)

Appeal under Section 30 of the Workmen's Compensation Act, 1923

Present :
Shri Vaibhav A. Goverdhan, counsel for the appellant.
Shri S.P. Kale, counsel for respondent No.1.
Shri N.K. Agrawal, Senior Advocate with Shri Qamrul Aziz, counsel for respondent No.2.

ORDER

(Passed on 6th of December, 2007)

This order shall govern M.A.(C.)No.1047/2007 preferred by the Branch Manager, New India Assurance Co. Ltd., Bilaspur (henceforth "the insurer"), M.A.(C.)No.1246/2007 preferred by the claimant Laxminarayan Thawait (henceforth "the claimant") and M.A.(C.)No.1247/2007 filed by Ashok Bus Service, Bus Stand, Bilaspur (henceforth "the employer").

(2) Brief facts giving rise to all the above mentioned appeals are as under:

An application under Section 30 of the Workmen's Compensation Act, 1923 (henceforth "the Act") was filed by the claimant before the Commissioner for Workmen's Compensation, Labour Court, Bilaspur (henceforth "the Commissioner") for compensation on the ground that Vinod Thawait, his son, a workman under the employment of Ashok Bus Service, as a cleaner, came in contact with a live electric wire and died due to electrocution on 07.05.2000 when he climbed the roof of the bus for unloading the luggage. The employer resisted the application on the ground that Vinod was not under its employment and climbed the bus in a drunken state and died as a result of falling from the bus. The insurer pleaded that the policy of insurance did not cover the risk of the deceased.

(3) The Commissioner by order dated 29.06.2007 held that death of Vinod arose out of and in the course of his employment with "the employer". It further held that the policy of insurance issued by the insurer covered the risk only of the driver and conductor and not of the cleaner. On these premises, the Commissioner exonerated the Insurance Company while awarding compensation of Rs.1,95,219/- against the employer. It further ordered that the employer shall refund the amount of Rs.50,000/- deposited by the insurer as interim compensation along with interest @ 10% per annum from the date of deposit i.e. 29.07.2003. After passing the said order, an application was moved by the employer on 29.06.2007 that pursuant to the decision of the Apex

Court in ***National Insurance Co. Ltd.*** **vs.** ***Swaran Singh and others,*** **2004 (1) TAC 321 (SC)**, the compensation should be ordered to be first paid by the insurer and thereafter recovered by the insurer from the owner. The Commissioner passed an order in the order-sheet on the same day directing the insurer to pay compensation first and to recover the same from the employer later. In the said order, it was also mentioned by the Commissioner that the said order was not a review of the order dated 29.06.2007 whereby the application under Section 30 of the Act was decided.

(4) Being aggrieved, the insurer filed M.A.(C.) No.1047/2007 on the ground that once the Commissioner had passed a final order on the application under Section 30 of the Act exonerating the insurance company from payment of compensation, he had no jurisdiction to review his order dated 29.06.2007. The employer preferred M.A.(C.)No.1247/2007 on the ground that under the branch copy of the policy of insurance Ex.D-1, premium had been paid to cover the risk of the cleaner and therefore, the liability to pay compensation was squarely on the insurer. The claimant preferred M.A.(C.)No.1246/2007 on the ground that the Commissioner was not justified in exonerating the insurance company from its liability to pay compensation.

(5) The finding recorded by the Commissioner that death of Vinod Thawait arose out of and in the course of his employment with Ashok Bus Service as cleaner is not disputed in this appeal.

(6) The following questions of law arose for consideration:

In M.A.(C.) No.1246/2007 and M.A.(C.) No.1247/2007:

"Whether the Commissioner for Workmen's Compensation, Labour Court, Bilaspur was not justified in exonerating the insurance company from its liability to pay compensation?"

In M.A.(C.) No.1047/2007:

"Whether the Commissioner for Workmen's Compensation, Labour Court, Bilaspur, after he had passed the order dated 29.6.2007 exonerating the insurance company from its liability to pay compensation, had any jurisdiction to modify the order on application filed by the claimant/respondent No.1?"

(7) Learned counsel for the appellants in all the miscellaneous appeals pressed the appeal only on the following points and on no other:

(i) Shri N.K.Agrawal, learned Senior Advocate for the insurer in M.A.(C.)No.1047/2007 argued that after passing the final order dated 29.06.2007, the Commissioner, having become *functous officio*, had no jurisdiction to modify the same by directing the insurer to pay the compensation first and to recover the same from the employer.

(ii) Shri Vaibhav A. Goverdhan, learned counsel for the appellant/employer in M.A.(C.)No.1247/2007 argued that under Rule 41 of the Workmen's Compensation Rules, 1924 (henceforth 'the Rules, 1924'), the Commissioner had jurisdiction to pass an order of pay and recover for the reason that the interest of the parties was not prejudiced. It was further urged that Ex.D-1, the

branch copy of the insurance policy as also the testimony of Mukesh Sawai, Assistant Manager, New India Insurance Company in para 3 did not rule out the possibility that the risk of the cleaner was covered by the insurer. Therefore, the insurance company ought to have produced the policy document in original to prove that risk of the cleaner was not covered under the policy. It was admitted by learned counsel that after filing written statement, the employer remained *ex parte* before the Commissioner and did not either cross-examine the witnesses or adduce evidence.

(iii) Shri S.P.Kale, learned counsel for the appellant/claimant in M.A.(C.)No.1246/2007 against the final order dated 29.06.2007 passed by the Commissioner argued that the insurance company ought not to have been exonerated from its liability to pay the compensation.

(8) Having heard the rival contentions, I have perused the record. Rule 32 of the Rules, 1924 is as under:

> "**32. Judgment**. – (1) The Commissioner, in passing orders, shall record concisely a judgment, his finding on each of the issues framed and his reasons for such finding.
>
> (2) The Commissioner, at the time of signing and dating his judgment, shall pronounce, his decision, and thereafter no addition or alteration shall be made to the judgment other than the correction of a clerical or arithmetical mistake arising from any accidental slip or omission."

(9) A plain reading of the above provision shows that once the Commissioner had passed the order on 29.06.2007, he had no jurisdiction to review or modify the same except for correcting a clerical or arithmetical mistake arising from any accidental slip or omission. Thus, it is clear as daylight that the order passed on 29.06.2007 in the order-sheet by the Commissioner modifying final order passed earlier on the same day was without jurisdiction. Question of law framed in M.A.(C.) No.1047/2007 is answered accordingly.

(10) Rule 41 of the Rules, 1924 reads as under:

> "**41. Certain provisions of Code of Civil Procedure, 1908, to apply.** – Save as otherwise expressly provided in the Act or these Rules the following provisions of the First Schedule to the Code of Civil Procedure, 1908, namely, those contained in Order V, Rules 9 to 13 and 15 to 30: Order IX; Order XIII, Rules 3 to 10; Order XVI, Rules 2 to 21; Order XVII; and Order XXIII, Rules 1 and 2, shall apply to proceedings before Commissioners, in so far as they may be applicable thereto:
>
> Provided that–
>
> (a) for the purpose of facilitating the application of the said provisions the Commissioner may construe them with such alterations not affecting the substance as may be necessary or proper to adapt them to the matter before him;
>
> (b) the Commissioner may, for sufficient reasons, proceed

> otherwise than in accordance with the said provisions if he is satisfied that the interests of the parties will not thereby be prejudiced."

After reading Rules 32 and 41 of the Rules, 1924 together, there remains no doubt that once the insurer was exonerated from its liability to pay compensation, the Commissioner had no jurisdiction to review or modify the final order and to direct the insurer to first pay and recover later the compensation from the owner.

(11) The insurer had, in paragraph 6 of the written statement, categorically admitted that it had insured the Bus No.MP 26C 5565 under the provisions of the Motor Vehicles Act, 1988. It had also proved the branch copy Ex.D-1 of the cover note issued by it, in which, under the column "limited liability to paid driver and/or conductor as per endorsement No.I.M.T.18", it was typed "1D+C". The argument advanced by learned counsel for the owner that the word "C" also denotes cleaner is misconceived because the column specifically shows that premium is paid for driver and/or conductor and, therefore, the word "C" implies only a conductor and not a cleaner. The owner could have either filed the policy in original or entered the witness box to rebut that it had paid additional premium to cover the risk of the cleaner. This was not the case of the owner because in his written statement, it did not plead so. On the contrary, it pleaded that the deceased was not an employee and in a drunken state had climbed the bus and died due to a fall. Thus, it is not a case where the owner specifically averred that it had paid

additional premium to cover the liability of the cleaner. The testimony of Shri Mukesh Sawai, Assistant Manager of the insurer, N.A.W.-1 clearly shows that risk of the cleaner was not covered under the policy of insurance. Although he admitted in paragraph 3 that the word "C" may besides signifying cleaner had other meanings also yet with reference to the present case he categorically stated that the word "C" was with reference to the conductor. In this view of the matter, the Commissioner was wholly justified in reaching a conclusion that the policy of insurance did not cover the risk of the cleaner and exonerating the insurance company from its liability to pay compensation. Question of law in M.A.(C.) No.1246/2007 and M.A.(C.) No.1247/2007 is answered accordingly.

(12) In the result, M.A.(C.)No.1047/2007 filed by the insurer is allowed. The order dated 29-06-2007 passed by the Commissioner in the order-sheet, whereby the final order dated 29-06-2007 was modified, is set aside. M.A.(C.) No.1246/2007 and M.A.(C.) No.1247/2007 are dismissed.

Sd/-
Dilip Raosaheb Deshmukh
Judge
06-12-2007

Kvr/Gopal